IN THE

# Supreme Court of the United States

October Term, 1948

No. 689

CHARLES C. CARLSON, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*
LOUISE C. CARLSON, *Intervener*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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April, 1949

WILSON - EPES PRINTING CO. - RE 6003 - WASHINGTON 1, D. C.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Charles C. Carlson, Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on February 14, 1949, which affirmed a decision of the Federal Communications Commission denying the application of Charles C. Carlson for renewal of license for Station WJBW, a standard broadcast station in New Orleans, Louisiana, and granting the application of Louise C. Carlson for a construction permit for the facilities of Station WJBW.

## OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 276-277) has not yet been reported. The decision and order of the Federal Communications (R. 204-246, 272-275) has not yet been reported.

## JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on February 14, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

## STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934, as amended, 47 U. S. C. 151, *et seq.* (hereinafter referred to as the "Communications Act") are set forth in the Appendix, *infra*, pp. 21-23.

## QUESTIONS PRESENTED

1. Whether the Court below erred in failing to hold that the Commission's orders denying Petitioner's application for renewal of license and granting Intervener's application for construction permit were erroneous, arbitrary and contrary to law, in that they resulted in depriving Petitioner of his right to operate Radio Station WJBW without affording him the hearing provided for by Section 309(a) of the Communications Act, the oral argument provided for by Section 409(a) of the Communications Act, and due process of law guaranteed by the Fifth Amendment to the Constitution of the United States by reason of the fact that Petitioner was not permitted to have counsel of his choice represent him at the oral argument.

2. Whether the Court below erred in failing to hold that the Commission's order granting Intervener a comparative hearing with Petitioner for the license of Station WJBW was erroneous, contrary to law, and arbitrary, in that it deprived Petitioner of substantive and procedural rights acquired by reason of the hearing held upon Petitioner's application prior to the filing of Intervener's application.

3. Whether the Court below erred in failing to hold that the Commission's actions in refusing to consider Petitioner's application for construction permit to install a new transmitter and other equipment and to consider evidence of his purpose and plans for the future technical operation of Station WJBW were erroneous, arbitrary and capricious.

4. Whether the Court below erred in failing to hold that the Commission's action in refusing to consider evidence of the violation by Intervener of Section 310(b) of the Communications Act was arbitrary and capricious.

5. Whether the Court below erred in refusing to hold that the decision reached by the Commission was erroneous, arbitrary and capricious, in that the Commission failed to consider all the evidence, failed to weigh other qualifications of Petitioner and failed to consider on a comparative basis the applications of Petitioner and Intervener, and failed to find that Petitioner was qualified to receive a renewal of license from the Commission.

## STATEMENT

### Petitioner

Charles C. Carlson, Petitioner, is the licensee of Radio Station WJBW, a standard broadcast station located at New Orleans, Louisiana. The station operates on the frequency 1230 kc, with power of 250 watts, unlimited time. Petitioner has operated WJBW since 1926.

**The Proceedings Before the Commission**

On August 14, 1942, Petitioner filed his application for renewal of license (R. 9-11). On August 10, 1943, the Commission designated the application for hearing on issues relating to alleged violations of the technical provisions of the Commission's Rules and Standards of Good Engineering Practice (R. 11-17). A hearing was held before an examiner appointed by the Commission on November 8, 9 and 10, and December 31, 1943.

On June 27, 1946, the Commission designated Petitioner's application for further hearing upon additional issues relating to the technical and financial qualifications of Petitioner to continue the operation of WJBW and the nature and character of the program service rendered in the past and proposed to be rendered (R. 88-92).

On September 9, 1946, Louise C. Carlson, ex-wife of Petitioner and Intervener herein, filed an application for construction permit requesting the facilities of WJBW. The application was designated for hearing on September 25, 1946, and consolidated for comparative hearing with Petitioner's application (R. 101-103). The hearing was held on November 4, 5 and 6, 1946.

On May 28, 1947, Petitioner filed an application for construction permit to change the transmitter location of WJBW and to install a new transmitter and antenna system in order to meet the Commission's objections to the technical operation of Station WJBW. On September 24, 1947, Petitioner filed a petition with the Commission requesting joint consideration of that application with the said renewal of license application (R. 167-168). The petition pointed out that equity and fairness required that the Commission consider both applications together since the application for construction permit to replace old equipment was filed for the specific purpose of alleviating technical difficulties of operation and "of clearing up the

technical discrepancies". This petition was denied on October 2, 1947, and the application was ordered held in the pending file of the Commission until final decision on the renewal application (R. 170-171).

On December 10, 1947, the Commission issued a proposed decision proposing to deny Petitioner's application for renewal of license and to grant Intervener's application. Exceptions to this decision were filed on December 30, 1947, and oral argument was requested.[1]

On February 9, 1948, the Commission scheduled oral argument for February 17, 1948. On February 10, 1948, Petitioner filed a petition to reopen the record and continue the oral argument (R. 171-173). The petition pointed out that counsel had received notice of the date of oral argument only on February 9, 1948, and again urged the Commission to consider the plans of Petitioner to install new equipment. This petition was denied by the Commission on February 11, 1948 (R. 174-175). On February 12, 1948, Mr. Maurice B. Gatlin, Petitioner's New Orleans counsel, who had represented Petitioner throughout the proceeding before the Commission, telegraphed a request to the Commission to continue the oral argument because of his prior commitments to appear in the New Orleans District Court and to make a speech in a gubernatorial campaign (R. 175). On February 13, 1948, the Commission denied this request for continuance of the oral argument (R. 176). On February 16, 1948, a firm of Washington attorneys who had represented Petitioner at the hearing in 1946 notified the Commission that they were withdrawing from the case (R. 184).

On February 17, 1948, Mr. Harry R. Hill of New Orleans entered his appearance on behalf of Petitioner, renewed the request for continuance and formally objected to the

[1] The proposed decision has not been printed in the Record since it is substantially the same as the final decision, R. 204-246.

proceeding (R. 185-189). The request for continuance was denied and oral argument was held as originally scheduled (R. 186, 207-209 footnote 6a).

On March 18, 1948, Petitioner filed a second petition to reopen the case for further hearing (R. 189-201). Petitioner recited in this petition the attempts of Intervener to seize possession of Station WJBW and to operate it contrary to Section 310(b) of the Communications Act of 1934, which prohibits transfer of control of a station license without prior consent of the Commission in writing. The Commission denied this petition on April 22, 1948 (R. 202-203).

On April 26, 1948, the Commission released its final decision denying the application of Petitioner and granting the application of Intervener (R. 204-246). On May 14, 1948, Petitioner filed with the Commission an application for rehearing pursuant to Section 405 of the Communications Act (R. 248-270). In this application, Petitioner alleged and showed (1) that Petitioner was entitled to a decision upon his application without regard to a consideration of Intervener's application, and that Petitioner had been substantially prejudiced by the action of the Commission in designating Intervener's application for comparative hearing with Petitioner's application, (2) that Petitioner's petitions of September 24, 1947, and February 10, 1948, the first requesting joint consideration of his application to change transmitter location and install new technical equipment, the latter requesting reopening of the record to show his purpose and plans to purchase new equipment and generally to conform with all technical requirements of the Commission's Rules, should have been granted, (3) that Petitioner's petition of March 18, 1948, requesting reopening of the record to show his plans to install new equipment and to show Intervener's attempted violation of Section 310(b) of the Communications Act should have been granted, (4) that Petitioner

had been denied due process of law as guaranteed by the Fifth Amendment to the Constitution in that he was not permitted to have counsel of his choice represent him at oral argument before the Commission, which oral argument is provided for by Section 409(a) of the Communications Act of 1934, as amended, (5) that Petitioner possesses the necessary financial qualifications to operate WJBW and has in the past, and will in the future, operate WJBW programwise in the public interest, convenience and necessity, and (6) that Petitioner was entitled to a grant of his application when his failure to conform to certain technical regulations are weighed with the service which he has rendered for over twenty-two years to the people of New Orleans. In the application for rehearing, Petitioner requested that the Commission (1) grant a rehearing upon Petitioner's application, or (2) grant a rehearing upon Petitioner's application and a hearing upon his application for construction permit to install new equipment, or (3) reconsider its decision and grant Petitioner's application, or (4) reopen the case for further hearing, (5) grant oral argument upon the application for rehearing and/or reargument upon the case, and (6) stay its Order of April 22, 1948, (released April 26) pending determination of the application for rehearing.

On August 2, 1948, the Commission released its Memorandum Opinion and Order denying Petitioner's application for rehearing (R. 272-275).

**The Opinion Below**

On August 19, 1948, Petitioner took an appeal to the United States Court of Appeals for the District of Columbia Circuit from the decision of the Commission denying his application for renewal of license and granting Intervener's application for construction permit (R. 2-7). Oral argument before the lower court was held on February 11, 1949, and on February 14, 1949, the court affirmed the decision of the Commission (R. 276-277). The de-

cision was *per curiam* and simply stated: "We find no error in the record. The decision of the Federal Communications Commission is therefore affirmed".

## REASONS FOR GRANTING THE WRIT

Since the Communications Act became law in 1934, the Commission has denied renewals of licenses in extremely few cases. This Court on one occasion only has reviewed an action of the Commission denying a renewal of license, namely in *Federal Communications Commission* v. *WOKO, Inc.*, 329 U. S. 223. There is now pending before the Court a Petition for Writ of Certiorari, filed by the Commission in Case No. 584, *Federal Communications Commission* v. *Broadcasting Service Organization, Inc.*, 171 F. 2d 1007, to review a decision of the Court of Appeals for the District of Columbia Circuit in which that court withheld from the Commission the authority to deny a renewal of license to a licensee which had admittedly misstated and failed to reveal facts as to its stock ownership and financial status. Petitioner's case presents a different facet of the same problem, that is, what principles are to guide the Commission — and the Court below upon review — in exercising its statutory authority to grant or deny renewals of licenses. It is submitted that it would be appropriate for this Court to review the decisions of the Court below in No. 584 and in this case in order to lay down well-defined principles for the guidance of the Commission in future cases.

The dominant issue underlying the questions presented in this case is whether the Commission has given Petitioner the full and fair hearing required by the Communications Act, the Due Process Clause of the Fifth Amendment to the Constitution of the United States, and this Court's decisions in the *Morgan* cases, 298 U. S. 468, 304 U. S. 1. Section 309(a) of the Communications Act re-

quires the Commission to grant a hearing upon an application for renewal of license. Section 409(a) of the Communications Act requires the Commission to hear oral arguments upon the request of a party. Due process requires a full and fair hearing including the right to present evidence and to advocate the cause through counsel of choice. This Court has held that a full and fair hearing requires that he who decides must hear.

1. Section 309(a) of the Communications Act requires the Commission to grant a hearing to an applicant for renewal of license unless it can determine from an examination of the application that the public interest would be served by granting it without a hearing. Section 409(a) of the Act provides that in all cases heard by an examiner, the Commission shall hear oral arguments upon request. This section of the Act is a statutory affirmation of a right essential to the fulfillment of the requirements of a full and fair hearing under the due process clause of the Fifth Amendment to the Constitution of the United States. It would seem also that this Court made it clear that oral argument is essential to a fair and full hearing in administrative proceedings. Particularly is this true where oral argument represents the only opportunity for a party to appear and advocate his cause before the members of an administrative agency who are to decide the questions of law and fact presented. *Morgan* v. *United States,* 298 U. S. 468, 304 U. S. 1.

Just as it is clear that Petitioner is entitled to a full and fair hearing including oral argument, it is equally clear and fundamental in our system of law that he is entitled to have counsel of his own choice represent him. In *Powell* v. *Alabama,* 287 U. S. 45, the Court said:

> "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal

> would be a denial of a hearing and, therefore, of due process in the Constitutional sense."

The Rules and Regulations of the Commission recognize this right. Section 1.711 of the Rules provides that:

> "Any person appearing before the Commission or any of its representatives may be heard in person and may be accompanied, represented and advised by counsel."

and Section 1.716 provides that:

> "Each attorney representing a party to any proceeding shall enter his appearance in duplicate on the form prescribed for the purpose by the Commission prior to participating in such proceeding, which appearance shall be made a part of the record."

In the instant proceeding before the Commission, Petitioner was given but eight days' notice of the date of his required attendance before the Commisison at the oral argument. Three times between February 9, 1948, and February 17, 1948, Petitioner requested that the oral argument be postponed. Two of these requests were made specifically in order to make it possible for Petitioner to be represented by counsel of his choice, namely Mr. Maurice B. Gatlin of New Orleans, and in order to permit that counsel to have adequate time to prepare for the argument and to arrange his affairs so that he would be able to attend. Mr. Gatlin, who alone had represented Petitioner throughout the six year proceeding before the Commission, and who, therefore, was most familiar with the case, was retained by Petitioner to represent him at the oral argument. At the time the argument was scheduled, Mr. Gatlin had important previously made engagements in New Orleans, and for that reason and the shortness of time allowed to prepare for argument, he requested the Commission to continue the argument. Three times the request for continuance was denied as not conducing "to the orderly dispatch of the Commission's business" and

as not furthering the ends of justice. This is a case which the Commission had under consideration for more than five years. No action of Petitioner's prevented the Commission from reaching a decision at any time during that period. Yet after a lapse of over five years, it suddenly became imperative that oral argument be held upon eight days' notice to out-of-town counsel. Since oral argument is the only opportunity that an applicant before the Commission has of advocating his cause to the Commissioners who are to decide his case, it is the most important procedure available to him. By thrice denying Petitioner's requests for a continuance of the argument, the Commission effectively denied Petitioner the right to counsel of his own choice. Thus Petitioner has not had the full and fair hearing to which he is entitled, nor has he been heard by those who decided his case. As this Court said in *Morgan* v. *United States,* 298 U. S. 468, 480:

> "The hearing is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."

2. When the Commission on September 25, 1946, designated Mrs. Carlson's application for comparative hearing with Petitioner's application, it acted contrary to law, contrary to established policy; and, if it had any discretion, such action was an abuse thereof.

In the case of *Federal Communications Commission* v. *Pottsville Broadcasting Company,* 309 U. S. 134, the Court held that because one application had been filed prior to another application the Commission was not bound to determine whether the first applicant was qualified to receive a license before deciding the later filed application. The Court held that the Commission could give comparative consideration to the applications. In the later case of *Ashbacker Radio Corporation* v. *Federal Communications Com-*

*mission*, 326 U. S. 327, the Court held that where two applications were on file, only one of which could be granted, and neither of which had been heard by the Commission, the Commission could not grant one application and designate the other for hearing. Such a procedure was held to be tantamount to denial of the hearing provided for by Section 309(a) of the Act. Following this latter decision of the Court, the Commission adopted rules, effective December 2, 1946 (Sections 1.387(b), 1.724, App. p. 23, 25), which provide that in order for an applicant to secure a comparative hearing, his application must be on file at least twenty days before the date on which the hearing on the prior application is scheduled. This rule in substance is but an expression of Commission policy, which was followed consistently by the Commission prior to December 2, 1946. The significant change which the Commission made in its Rules on that date was to provide a cut-off date, that is, twenty days before the scheduled date of the hearing. Prior to December 2, 1946, the Commission's Rules (Sections 1.387(b)(3), 1.724, App. p. 24, 25) provided only that persons filing mutually exclusive applications after another application had been *designated for hearing* would be named as parties in the Commission's discretion. The Commission insists that this rule meant that it had absolute discretion to designate an application for comparative hearing with another application even *after the hearing had commenced upon the prior application.* Such an interpretation of the rule cannot be sustained since it would mean that the Commission would have had absolutely arbitrary power to hear or not to hear an application filed after another application mutually exclusive with the first had been filed. This arbitrary power could have been exercised by the simple expedient of designating an application for hearing the day after it had been filed. Thereafter, it would have been entirely discretionary with the Commission whether or not to designate for hearing a subsequently filed application even

though the hearing on the first application might not take place until a year or more after its designation for hearing. Nowhere in the *Pottsville* or *Ashbacker* cases or in the Commission's Rules and Regulations can there be found any suggestion that the Commission was empowered to grant a comparative hearing to an applicant who filed an application after a hearing had commenced on another application for the same facilities.

Furthermore, Petitioner had acquired substantive rights by virtue of the first hearing held upon his application, and had incurred liabilities because the record of the first hearing was made on the basis of the proceeding being *ex parte*. If Petitioner had known at the time of the first hearing that the Commission might thereafter give comparative consideration to another application, his presentation of his case would have been different. Certainly the burden of proof in a competitive hearing and the criteria used in determining competitive cases are different than those in *ex parte* proceedings. In almost every instance in the past, the Commission, after hearing, has decided that the public interest would be served best by renewing the licenses of stations on the representations of the licensees that there would be improvements in the technical operation of the stations. The fact that an applicant for the facilities of Station WJBW was allowed to participate in the renewal proceeding upon Petitioner's application after the latter application had been in hearing for three years prejudiced Petitioner's chance of obtaining a favorable decision. Under the circumstances of this case, the Commission's action in consolidating Intervener's application for hearing with Petitioner's application was clearly an abuse of discretion, if the Commission had any discretion at all.

3. Section 309(a) of the Communications Act provides that:

> "If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe."

When the Commission refused to hear Petitioner upon his application for construction permit to install new equipment, by denying his petition for joint consideration of that application with his renewal of license application and by placing that application in the pending files, it indirectly, but nonetheless effectively, denied the application without hearing. Likewise, the action of the Commission in denying Petitioner's first petition to reopen the record to show his plans to install new equipment was a denial of Petitioner's right to be heard fully upon his application for renewal of license. The Commission's decision refusing to grant Petitioner a renewal of license rests substantially upon the ground that Petitioner had been guilty of violations of regulations and standards of good engineering practice, technical in nature, regarding the maintenance and operation of equipment. In such circumstances, it seems clear that these actions of the Commission were arbitrary and capricious. In this case the Commission was examining the qualifications of an applicant for renewal of license. Basic principles of fairness and equity require that such an applicant be given a full opportunity to show how he proposes to operate during the succeeding license period. No more material evidence could have been offered than Petitioner tendered. The Commission's refusal to permit such evidence to be intro-

duced into the record makes void its subsequent action in denying the application for renewal of license.

4. Section 310(b) of the Communications Act prohibits any transfer or assignment, voluntary or involuntary, of any of the rights granted to a licensee without prior consent of the Commission in writing. This section of the Act is mandatory and requires that the Commission exercise at all times complete jurisdiction over station licenses and the rights granted thereunder. Petitioner's second petition to reopen the record, which was filed after the Commission's proposed decision and oral argument, but before its final decision herein, recited the attempts of the Intervener, occurring subsequent to the oral argument, to seize possession of Station WJBW and to operate it without consent of the Commission. The petition recited specifically that the Intervener had filed a suit in the District Court for the Parish of Jefferson, Louisiana, requesting that the station be seized and a sequestrator appointed to administer its affairs. The court did in fact appoint the sheriff to employ an administrator "to operate the business of said radio station". Petitioner was forced to furnish bond in order to obtain a release of the seizure. In its Order of April 22, 1948, denying the petition (R. 203), the Commission asserted that it had no jurisdiction in the premises because the legal issues arose out of the previous marital status of the Carlsons. The Commission cannot shirk its responsibility to administer the Communications Act. The events occurring subsequent to the Commission's proposed decision vitally affected the status of the license of Station WJBW and the right to operate the station. Petitioner charged the Intervener with a direct and deliberate violation of Section 310(b) of the Act. Had the Commission considered the evidence thus proffered by Petitioner, it might well have reached a different conclusion than it did reach in denying Petitioner's application and granting Intervener's application.

Petitioner does not contend that it would be proper for this Court to hold that the Commission's final decision would of necessity have been changed, but on the other hand, it is not possible for this Court to decide that the final decision would not have been different if the Commission had considered the evidence offered. The Commission's action denying Petitioner's second petition to reopen the record is arbitrary in that it deprived Petitioner of an opportunity to show that Intervenor was unqualified to become a licensee.

The lower court's decision in this case appears to be in conflict with its decision in *WJR, The Good Will Station, Inc.* v. *Federal Communications Commission,* No. 9464, decided on October 7, 1948. In that case, the Court held that due process of law, as guaranteed by the Fifth Amendment, requires a hearing, including an opportunity to make oral argument on every question of law raised before a judicial or quasi-judicial tribunal, including questions raised by demurrer or as if on demurrer, except such questions of law as may be involved in interlocutory orders. It accords to every person who claims injury or threat of injury an unconditional right of access to such tribunals to the extent, at least, of being allowed to present his claim and argue that the allegations thereof, if true, entitle him as a matter of law to relief. This Court has granted certiorari in the *WJR* case (*cert. granted* February 28, 1949, No. 495), but the case has not yet been heard. The Commission's Order of April 22, 1948, denying the aforesaid petition and reciting that the events occurring subsequent to the proposed decision and the oral argument, even if proved, could not alter the decision because they concerned legal issues arising out of the previous marital status of the applicants and disputed private rights in the physical and financial assets of Station WJBW over which it has no jurisdiction, was a decision on a question of law and was taken without affording

Petitioner a hearing of any kind. Certiorari is warranted in this case, along with the *WJR* case, to define and circumscribe the area in which the Commission is required to "hear" petitions of interested parties presenting questions of law or fact and the area in which petitions may be denied without a hearing.

5. Petitioner in this case stands convicted by the Commission of violations of its Rules and Standards of Good Engineering Practice relating in the main to the technical operation of the equipment of Station WJBW. The violations complained of by the Commission occurred between February 9, 1940, and January 21, 1946. During most of this period, materials for the construction and maintenance of broadcast equipment were in very critical supply and it was difficult to secure efficient manpower because of the requirements of the armed services. Petitioner at all times realized that in order to place WJBW in first class operating condition, it would be necessary to change his transmitter location and install new equipment. He attempted to effect this end by filing an application for construction permit, the application the Commission refused to consider (See Para. 3, *supra.*). Neither the Commission nor apparently the court below gave any consideration whatsoever to the severe handicaps under which Petitioner was operating WJBW during war time. Instead, in its Findings of Fact, the Commission recited in minute detail violations by Petitioner of its Standards of Engineering Practice for the operation of radio stations. Petitioner concedes that most of these violations occurred, but questions whether the Commission was justified, without more, in concluding that Petitioner has demonstrated his unfitness to continue further in the operation of Station WJBW. Petitioner has operated Station WJBW since 1926. The record in this proceeding is devoid of a single complaint from the public concerning the operation of the station and no one has been injured by

the technical violations of the Commission's Rules and Standards. Petitioner has shown a complete willingness and readiness to correct the conditions which lead to the violations, but the Commission has refused absolutely to consider Petitioner's application to install new equipment and to move his transmitter site.

The Commission has most capriciously failed to give consideration to the evidence which Petitioner presented in explanation of his violations. As a typical example, the following will demonstrate the arbitrary nature of the Commission's decision. In its Findings of Fact entitled "Violations of Regulations Requiring Suitable Facilities for Welfare and Comfort of Operators" (R. 218), the Commission pointed out in footnotes to the Findings the following explanations offered by Petitioner:

> 1. ". . . but the applicant testified that on the occasion of the inspector's visit the outhouse was filled with material for repairing the outhouse which 'had given way on one side' and that 'the material was left overnight'." (R. 219).
>
> 2. ". . . Carlson responded by affidavit: 'The water pipe was broken by contractors digging up streets for a housing project by our transmitter. This pipe was broken on two previous occasions during the past 30 days and on a different place each time, and we have had to get a plumber to repair it. It was broken by outsiders for the third time the day before the inspection and a plumber was not available until the following day when it was repaired. All this is due to housing projects and construction of streets'." (R. 219).
>
> 3. ". . . his response . . . stated: 'Every effort has been made to have the proper repairs made, but by reason of the labor shortage, such efforts have not been successful. Efforts are continuing, and in addition a new transmitter site is being sought for submission to the Commission for approval, at which site it is hoped that more modern facilities will be available'." (R. 221).

The record shows the following to be the situation: The transmitter of Station WJBW is located in pasture country. When the Commission first insisted (in 1940) upon better facilities for the operators, the only practical means was an outhouse. At the time of the hearing in 1943, no sewerage facilities were as yet available. Carlson attempted to secure permission from the City and the Water Board to tie in with the water main and finally arranged to build a cesspool. Even though he was faced with a fine by the City of New Orleans, he built a pipe line to the transmitter house and connected it with the city water mains. At the time of the hearing in 1946, lavatory and toilet facilities inside the transmitter house were installed. A sewer had been installed, but it could not be connected because of the impossibility of obtaining the required material as it was necessary to obtain a priority which could only be had for veterans' housing. This latter testimony was supported by the witnesses Gatlin and Newman. (R. 32-33, 46-48, 107, 109, 124, 141-144). The whole of this testimony is unrefuted in the record. Rather than demonstrating Petitioner's unfitness to continue the operation of Station WJBW, the evidence shows the complete willingness and the constant attempts of Petitioner to provide suitable facilities for the welfare of his operators.

Petitioner's explanations of other violations are set forth in the record at pages 31-52, 73-77, 86-87, 103-126, 134-138. A reading of this testimony in the light of the Commission's decision makes it clear that the Commission has disregarded it. Since most of this testimony is unrefuted, the Commission is required to consider it and to make findings of fact with respect thereto. The failure so to do leads inevitably to the conclusion that the decision of the Commission is arbitrary and capricious.

In *Federal Communications Commission* v. *WOKO, Inc.*, 329 U. S. 223, this Court held that the Commission was justified in refusing a renewal of license where stock own-

ership had been wilfully concealed and misrepresented over a period of years and that judicial discretion could not be substituted for administrative discretion. In the Court's opinion, the mere fact of wilful concealment of stock ownership, *per se* justified the conclusion that the applicant was disqualified as a licensee and could not be relied upon to operate a station in the public interest. In this case, there has been no deception practiced upon the Commission and no concealment of any fact. In and of itself, the mere fact that certain technical rules of the Commission have been violated cannot justify the conclusion that an applicant for renewal of license is unfit. Such a holding would be a *non sequitur* and would completely nullify the statutory provisions guaranteeing a hearing to all applicants. The Commission must act in accordance with the statutory standard of what is in the public interest, convenience or necessity. Unless the Commission is able to find from the facts that the public interest requires the denial of an application by reason of an extant condition which precludes the possibility of the public interest being served, i. e., in the sense that such condition of itself would justify the denial, it must weigh and consider all of the evidence, and in a case where there are competing applicants it must give comparative consideration to the applications.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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April, 1949

## APPENDIX

### SECTIONS OF THE COMMUNICATIONS ACT PERTINENT TO THIS PETITION ARE:

Sec. 309(a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

Sec. 310(b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing.

Sec. 402(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

(3) By any radio operator whose license has been suspended by the Commission.

Sec. 402(e) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code, as amended, by appellant, by the Commission, or by any interested party intervening in the appeal.

Sec. 405. After a decision, order, or requirement has been made by the Commission in any proceeding, any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear: *Provided, however,* That in the case of a decision, order, or requirement made under title III, the time within which application for rehearing may be made shall be limited to twenty days after the effective date thereof, and such application may be made by any party or any person aggrieved or whose interests are adversely affected thereby. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted, the proceedings thereupon shall conform as nearly as may be to the

proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination, shall be subject to the same provisions as an original order.

Sec. 409(a). Any member or examiner of the Commission, or the director of any division, when duly designated by the Commission for such purpose, may hold hearings, sign and issue subpœnas, administer oaths, examine witnesses, and receive evidence at any place in the United States designated by the Commission; except that in the administration of title III an examiner may not be authorized to exercise such powers with respect to a matter involving (1) a change of policy by the Commission, (2) the revocation of a station license, (3) new devices or developments in radio, or (4) a new kind of use of frequencies. In all cases heard by an examiner the Commission shall hear oral arguments on request of either party.

## RULES AND REGULATIONS OF THE FEDERAL COMMUNICATIONS COMMISSION

Sec. 1.387(b) The Commission will on its own motion name as parties to the hearing:

(1) Any existing licensee or holder of an outstanding construction permit who, if the application were granted, would suffer electrical interference within his normally protected contour as prescribed by the Commission's Rules and Regulations.

(2) Any existing licensee or holder of an outstanding construction permit whose license or construction permit would have to be modified or revoked, or whose application

for renewal of license would have to be denied, if the application in question were granted.

(3) Any person who, prior to the time the application in question was designated for hearing, had filed with the Commission a mutually exclusive application. Any person filing an application that is mutually exclusive with another application or applications already designated for hearing will be consolidated for hearing with such other application or applications only if the application in question is filed at least 20 days before the date on which the hearing on the prior application or applications is scheduled. If the scheduled date is changed, the date last set shall govern in determining the timeliness of an application for purposes of this subsection. If the application is filed after the 20-day period, it will be dismissed without prejudice and will be eligible for refiling only after a decision is rendered by the Commission with respect to the application or applications designated for hearing or such applications are withdrawn or dismissed.

(4) In order to avail himself of the opportunity to be heard, any person named as a party pursuant to this subsection shall, within 15 days of the mailing of the notice of his designation as a party, file with the Commission, in person, or by attorney, a written appearance in triplicate, stating that he will appear and present evidence on the issues specified in the notice of hearing.

Sec. 1.387(b)(3) *(effective prior to December 2, 1946).* Any person who, prior to the time the application in question was designated for hearing, had filed with the Commission a mutually exclusive application. Persons filing mutually exclusive applications after the application in question has been designated for hearing will be named as parties only if the Commission in its discretion deems such action advisable.

Sec. 1.711 Appearances.—Any person appearing before the Commission or any of its representatives may be heard in person and may be accompanied, represented and advised by counsel.

Sec. 1.716 Appearance blanks.—Each attorney representing a party to any proceeding shall enter his appearance in duplicate on the form prescribed for the purpose by the Commission prior to participating in such proceeding, which appearance shall be made a part of the record.

Sec. 1.724 Petitions to consolidate.—(a) The Commission, upon motion, or upon its own motion, will, where such action will best conduce to the proper dispatch of business and to the ends of justice, consolidate for hearing (1) any cases which involve the same applicant or arise from the same complaint or cause, or (2) any applications which by reason of the privileges, terms, or conditions requested present conflicting claims of the same nature.

(b) Any person filing an application that is mutually exclusive with another application or applications already designated for hearing will be consolidated for hearing with such other application or applications only if the application in question is filed at least 20 days before the date on which the hearing on the prior application or applications is scheduled. If the scheduled date is changed, the date last set shall govern in determining the timeliness of an application for purposes of this subsection.

Sec. 1.724 *(effective prior to December 2, 1946).*

Petitions to consolidate.—The Commission, upon motion, or upon its own motion, will, where such action will best conduce to the proper dispatch of business and to the ends of justice, consolidate for hearing (a) any cases which involve the same applicant or arise from the same complaint or cause, or (b) any applications which by reason of the privileges, terms, or conditions requested present conflicting claims of the same nature.

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## CITATIONS





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# In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 689

CHARLES C. CARLSON, PETITIONER

*v.*

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

### OPINIONS BELOW

The findings of fact, conclusions of law, and order of the Federal Communications Commission (R. 204–246)[1] are not yet reported. The *per curiam* opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 276–277) is not yet reported.

### JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit,

[1] In this brief references to the printed record appear as (R. —), and references to the original administrative record filed with this Court appear as (Tr. —).

affirming the decision of the Federal Communications Commission, was entered on February 14, 1949 (R. 277). The petition for a writ of certiorari was filed on April 1, 1949. Petitioner invokes the jurisdiction of this Court under 28 U. S. C. 1254 (1).

## QUESTIONS PRESENTED

1. Whether the Federal Communications Commission improperly denied petitioner a full and fair hearing on his application for renewal of his radio broadcasting station license.

2. Whether the Federal Communications Commission improperly denied petitioner's application for renewal of his station license on the basis of findings and conclusions, made on the hearing record, that petitioner had demonstrated his lack of qualifications to continue as a radio station licensee by continued and persistent violations of the Commission's Rules and Regulations and Standards of Good Engineering Practice and by continued unsatisfactory operation of his station.

## STATUTE AND REGULATIONS INVOLVED

Certain sections of the Communications Act of 1934 (48 Stat. 1064), and certain of the Rules and Regulations of the Federal Communications Commission, have been set out in the Petition and Appendix attached thereto. Sections 307 (a) and 309 (a) of the Communications Act are reprinted in the Appendix, *infra*, p. 18.

**STATEMENT**

Petitioner Charles C. Carlson is the licensee of radio broadcasting station WJBW, New Orleans, Louisiana, operating on 1230 kilocycles with 250 watts power. On August 14, 1942, Carlson filed an application for renewal of license of Station WJBW (R. 9–11). On August 10, 1943, the Commission, being unable to determine that a grant of the application would be in the public interest, designated the application for hearing, in accordance with the provisions of Section 309 (a) of the Communications Act, upon issues relating to official notices sent to the licensee of Station WJBW between the dates of February 9, 1940, and December 17, 1943, inclusive, for violations of the Commission's Rules and Regulations and Standards of good Engineering Practices, and covering 92 separate citations of various types of violations (R. 11–18).[2] A hearing was held on his application on November 8, 9, and 10, 1943, in New Orleans, Louisiana, and on December 31, 1943, in Washington, D. C.

On March 27, 1944, Mr. Carlson filed his proposed findings of facts and conclusions of law with the Commission (Tr. 587–595). In these

[2] The cited violations related, in the main, to (a) inadequate maintenance or improper operation of transmitting equipment, and other matters concerning the station's technical operation; (b) violation of wartime security requirements; and (c) improper keeping of or failure to keep operating logs, and improper announcement of programs (R. 204–205).

proposed findings he admitted that most of the violations charged in the Commission's notice of hearing had occurred (Tr. 589–590) but argued that since the transmitter in use at the station was in keeping with the Commission's requirements (Tr. 590–591) and petitioner had now engaged a competent engineer and general manager (Tr. 592–594), he was now in a position to operate his station in the public interest and in accordance with the Commission's Rules and Regulations. Petitioner stated further that "in view of some proven negligent violations of the Commission's Rules and Regulations in the past, however, this applicant should be required to prove that radio station WJBW has shown marked improvement and that there is evidence that it is now being operated in accordance with all of the Rules and Regulations of the Commission" (Tr. 594). The proposed findings recommended, therefore, that further inspections of the station be ordered at six-month intervals to determine whether it was now being operated "in strict accordance" with the Commission's Rules and Standards and that if these inspections so indicated, petitioner's renewal application should then be granted (Tr. 594–595).

Pursuant to petitioner's request, the Commission withheld further processing of petitioner's renewal application pending further inspection of the operation of Station WJBW. However, periodic inspections of the station between Jan-

uary 12, 1944, and January 21, 1946, instead of disclosing operation in compliance with the Commission's Rules and Regulations, resulted in the issuance of 17 additional notices of violations of the Commission's Rules and Regulations and Standards, involving 26 separate violation citations some of which concerned serious breaches of wartime security regulations (R. 216–218, 232–34). Thereafter, the Commission on June 27, 1946, designated petitioner's renewal application for further hearing upon additional issues relating to the technical and financial qualifications of the petitioner to continue operation of the station, the nature and character of the program service rendered and proposed to be rendered by the applicant, and the technical, security, and other violations occurring since the previous hearing (R. 88–92). This hearing was scheduled for October 10, 1946.

On September 20, 1946, Louise C. Carlson, New Orleans, Louisiana, ex-wife of petitioner, filed an application for a construction permit to authorize construction and operation of a new station on the frequency 1230 kilocycles with power of 250 watts at New Orleans, Louisiana, the same assignment requested by petitioner (R. 95–97). On the same date, Mrs. Carlson petitioned for a consolidated hearing on her application and the mutually exclusive application of petitioner (R. 97–100). No opposition to this petition was ever filed by the petitioner. On September 25, 1946,

the Commission granted Mrs. Carlson's unopposed petition and designated the consolidated hearing for October 10, 1946 (R. 101–103). At the request of the petitioner (Tr. 605–606), the consolidated hearing was continued until November 4, 1946 (Tr. 607), and was held on November 4, 5, and 6, 1946, at New Orleans, Louisiana (R. 167).

On May 28, 1947, six months after the hearing record had been closed, petitioner filed an application for a construction permit to change the transmitter location and install a new transmitter and antenna system, and four months later, on September 24, 1947, he filed a petition requesting joint consideration of this application for modification of the existing license of station WJBW and of his application for renewal of the station's license (R. 167–168). The Commission, on October 2, 1947, denied this petition for joint consideration and ordered action on the new application for a construction permit held in abeyance pending final decision of petitioner's application for renewal of license, since action on the new application "is contingent upon whatever action the Commission may take upon the pending renewal application of Charles C. Carlson" (R. 169–171).

On December 3, 1947, the Commission adopted a Proposed Decision, proposing to deny the application of petitioner for renewal of license of Station WJBW and to grant the application of

Louise C. Carlson for a construction permit for the same facilities (Tr. 1267–1302). On December 30, 1947, petitioner filed Exceptions to the Proposed Decision and a Request for Oral Argument (Tr. 1304–1310). The Commission, on February 9, 1948, scheduled the oral argument for February 17, 1948 (Tr. 1329).

On February 10, 1948, petitioner's Washington counsel filed a petition to reopen the record to take further testimony and continue oral argument (R. 171–173). The Commission denied this petition on February 11, 1948 (R. 174–175). Thereupon Mr. Maurice B. Gatlin, petitioner's New Orleans counsel, telegraphed the Commission on February 12, 1948, requesting that oral argument be continued until after March 15, 1948, alleging, for the first time, that he desired to present petitioner's oral argument but could not be present in Washington on the day set for oral argument (R. 175). On February 13, 1948, Louise C. Carlson filed an opposition to the telegraphed petition of Mr. Gatlin (R. 177–183) and the Commission, on February 13, 1948, denied the telegraphic petition for continuance of oral argument (R. 176). Thereafter, on February 16, 1948, one day before oral argument, the firm of Fisher, Wayland, Duvall and Southmayd, which had been representing the petitioner in Washington, notified the Commission, without explanation, that it had withdrawn from the case (R. 184).

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On February 17, 1948, Mr. Harry R. Hill, Mr. Gatlin's New Orleans associate, entered an appearance on behalf of the petitioner, (Tr. 1390), and participated in full argument before the Commission. At that time he also renewed his request for continuance of oral argument, which was refused by the Commission (R. 185–189; cf. R. 207–209, fn. 6 a).

Subsequent to the oral argument, petitioner, on March 18, 1949, filed a second petition with the Commission to reopen the case for further hearing (R. 189–201). The petition was denied by the Commission's Order of April 22, 1948 (R. 202–203).

The Commission's final decision, denying petitioner's renewal application and granting a construction permit to Louise C. Carlson, was released April 26, 1948 (R. 204–246). The Commission found that "by reason of the past unsatisfactory operation of Station WJBW and past conduct in failing to comply with the Commission's Rules, Regulations and Standards, the applicant, Charles C. Carlson, has demonstrated his unfitness to continue further in the operation of Station WJBW * * * [and] * * * public interest, convenience and necessity will not be served by a grant of his application for renewal of license * * *" The denial of petitioner's renewal application was explicitly placed upon grounds independent of, and apart from, any consideration of the application of Louise C. Carl-

son and, therefore, the Commission did not give comparative consideration to the two applications (R. 245–246). The Commission found, on the basis of detailed findings of fact and conclusions made on the record of the hearing, that a grant of the application of Louise C. Carlson would be in the public interest (R. 240–242). On May 14, 1948, petitioner filed with the Commission an application for rehearing and stay order (R. 248–270). This was denied by the Commission on July 30, 1948, in a Memorandum Opinion and Order (R. 272–275). On August 19, 1948, the petitioner appealed to the Court of Appeals for the District of Columbia Circuit under the provisions of Section 402 (b) of the Communications Act of 1934, as amended (R. 2–7). On February 14, 1949, after oral argument, the Court of Appeals (Edgerton, Prettyman and Proctor, JJ.) affirmed the Commission in a *per curiam* opinion stating "We find no error in the record. The decision of the Federal Communications Commission is therefore affirmed" (R. 277).

**ARGUMENT**

In spite of the multiplicity of questions which the petitioner has presented to this Court as reasons for granting a writ of certiorari, it is clear, as the court below found in its summary dismissal of petitioner's appeal, that no substantial issue or question of law is presented which would warrant the consideration of this Court. The attack is upon a decision of the Com-

mission denying an application for renewal of license for petitioner's radio station because the Commission determined that petitioner's record of violations of the Communications Act and the Commission's Rules and Regulations—a record disclosing no less than 118 separate violations over a period of approximately six years—demonstrated conclusively that he lacked the minimum requisite qualifications of a radio station licensee and that a renewal of his license would, therefore, not be in the public interest. This conclusion has ample support in the record and was reached after a full and fair hearing.

1. Neither in the petition for certiorari nor before the court below did petitioner challenge the undisputed authority of the Commission, under the provisions of the Communications Act of 1934, to refuse to renew a license of any person, where the record of his violations of the Act and the Commission's Rules and Regulations reasonably shows that the licensee either is not capable of conforming the operation of his station to the valid statutory and administrative requirements for such operation or is unwilling to do so. See *Greater Kampeska Radio Corp.* v. *Federal Communications Commission,* 108 F. 2d 5, 71 App. D. C. 117. Petitioner concedes that most of the charged violations occurred (Pet. 17, *supra,* p. 4), and the Commission's detailed findings of facts and conclusions, as well as the full record of the administrative hearing, make plain the

justification for its action in this case. The Commission decided to deny petitioner's application for renewal of license only after it was convinced by two hearings over a period of years that petitioner could not be entrusted with the duties of a licensee. After its first hearing on the matter in 1943 had disclosed a total of 92 separate violations of the Commission's Rules and Regulations, the Commission, at the request of the petitioner, withheld further action for a period of two years in order to determine from further inspections of the station whether the licensee could actually live up to his profession that he would reform his mode of operation and henceforth operate in accordance with the Commission's Rules and Regulations. It was only after these supplementary inspections resulted in some 17 additional notices of violations, involving 26 separate violations some of which concerned serious violations of wartime security regulations, and a further hearing in 1946 had verified the existence of these further violations, that the Commission reached its conclusion that the licensee was not qualified to continue operations as a radio broadcaster. This result, as the Commission's decision makes clear (*e. g.*, R. 211–214, 218, 219, 221, 224–225, 226, 227, 228, 231, 233, 234, 235, 238, 244–245), was arrived at only after full and detailed consideration of such explanations for his failures as the petitioner was able to submit. The reasonableness of the Commission's determination can-

not seriously be challenged; if the Commission cannot determine on the basis of a record such as the present one that continued operation by the licensee would not be in the public interest, then it could not reasonably be expected to secure any substantial compliance with, or enforcement of, its technical rules and regulations or of the Standards of Good Engineering Practice. Mere promises of reform are not sufficient to compel renewal of the license where the record conclusively establishes that previous like promises were not fulfilled, either because of petitioner's inability or his unwillingness to achieve compliance.

2. Petitioner also raises several alleged procedural errors which have no substance and present no significant issue for determination by this Court. Each of these claims was full argued by petitioner in the court below, in brief and oral argument, and was found to be without merit.

a. Principal reliance is placed here, as in the court below, upon the Commission's refusal to grant petitioner's several requests for continuances of oral argument on his exceptions to the Proposed Decision (Pet. 8–11).[3] These refusals

[3] Petitioner does not allege or suggest that he was deprived of the opportunity of introducing such evidence as he desired at the two extensive hearings, or of the opportunity to file exceptions to the Proposed Decision setting forth the tentative findings and conclusions of the Commission, together with a brief in support of these exceptions, or to request and secure oral argument before the Commission *en banc* before the adoption of any final decision in the matter.

petitioner contends deprived him of his right to a fair and full hearing under Section 309 (a) of the Communications Act, the oral argument provided by Section 409, and the due process of law guaranteed by the Fifth Amendment to the Constitution of the United States. It is clear, however, that administrative agencies, like courts, have a wide area of discretion in determining whether or not requests for continuances of judicial or administrative proceedings should be granted, and that reviewing courts will only intervene where it is evident that the agency or court has clearly abused it discretion. *Franklin* v. *South Carolina,* 218 U. S. 161, 168; *National Labor Relations Board* v. *American Potash and Chemical Corp.,* 98 F. 2d 488, 492 (C. A. 9); *Mississippi Valley Structural Steel Company* v. *National Labor Relations Board,* 145 F. 2d 664 (C. A. 8). The facts in the present case, fully set out and considered in the Commission's final Decision (R. 207–209, fn. 6a), clearly justify the Commission's conclusion that adjournment of the oral argument was unwarranted.

b. The insubstantiality of the claim (Pet. 11–13) that the Commission acted improperly in consolidating for joint hearing petitioner's renewal application and the mutually exclusive application of the intervenor (Mrs. Louise C. Carlson) for a construction permit to operate a station on the facilities then assigned to the petitioner is evidenced by the fact that no objection to the

consolidation was ever raised by the petitioner at any time while Mrs. Carlson's petition for consolidation was pending. Instead, petitioner objected to the consolidation for the first time in his petition for reconsideration filed over a year and a half later, after the adoption and issuance of the Commission's final decision (R. 250–253). The Commission's Rules and Regulations in existence at the time Mrs. Carlson requested joint consideration of the two applications (September 1946) expressly provided that an application filed subsequent to the time when a previous application had been designated for hearing, but mutually exclusive with such other application, could be designated to be heard in a consolidated proceeding if the Commission "in its discretion deems such action advisable." (Sec. 1.387 (b) (3) of the Commission's Rules, 11 Fed. Reg. 177–A–417 (1946), Pet. 24); and that the Commission would consolidate for hearing applications presenting conflicting claims of the same nature "where such action will best conduce to the proper dispatch of business and to the ends of justice." (Sec. 1.724 of the Commission's Rules, 11 Fed. Reg. 177–A–425 (1946), Pet. 25.) At the time of Mrs. Carlson's motion for consolidation, petitioner's application for license renewal had already been designated for further hearing in connection with the various violations of the Commission's Rules which had occurred subsequent to the first hearing in November, 1943. *Supra,*

p. 5. Since a hearing on the other mutually exclusive application was already required, it was clearly a reasonable determination on the part of the Commission that a joint hearing of the two applications would aid in the prompt dispatch of the Commission's business.

c. Similarly, there was no error in the Commission's refusal to consolidate petitioner's belated application to install new equipment (and to make other improvements) with the hearing on the applications of petitioner and intervenor for station licenses (Pet. 13–15). Petitioner's application for a construction permit was not even filed until six months after the consolidated hearing record on the two license applications was closed. No request for consolidation was made for an additional four months thereafter. *Supra,* p. 6. The issue in the license proceeding was not primarily whether petitioner possessed the requisite physical equipment to operate in the public interest, but whether his long history of violations, many of which had nothing to do with the condition of his equipment, was such that the Commission could properly conclude that he did not possess the minimum requisite qualifications of a broadcast licensee, without regard to what equipment he might install in his station. To the extent that the deficiencies in the existing equipment were relevant as an explanation for petitioner's various violations of the Commission's Rules and Regulations and Standards, he

had sufficient opportunity to produce the pertinent evidence in the two extensive hearings on the license application in 1943 and 1946, and, in fact, some such evidence was introduced by the petitioner. But the granting of the application for a construction permit was, as the Commission indicated, necessarily contingent upon whether or not the applicant personally possessed the minimum qualifications of a licensee (R. 170–171). There was, therefore, clear justification for the Commission's determination that action upon the construction application should be held in abeyance pending decision in the basic licensing proceeding.

d. Finally, it is evident that no issue worthy of review is raised by petitioner's claim that the Commission erred in refusing to reopen the record, after the conclusion of oral argument on the Proposed Decision, in order to take evidence with respect to the intervenor's alleged violations of Section 310 (b) of the Communications Act (Pet. 15–16). The Commission denied this request of the petitioner in an order dated April 22, 1948 (R. 202–203) which pointed out that the petition was not in compliance with the Commission's Rules prescribing the procedure for the filing of such motions; that most of the allegedly new evidence was known to the petitioner previously and had been presented to the Commission in the hearings, oral argument and pleadings already filed; and that with respect to the events

alleged to have occurred since the oral argument, the facts set forth pertained solely to disputes as to private interests in the physical assets of station WJBW which arose out of the previous marital status of the competing applicants, were properly the subject of state court adjudication, and were not germane to the present proceeding. The petitioner has at no time made any attempt to show that any of these conclusions upon which the Commission based its denial of the request to reopen the record were improper or incorrect, and the contention presents no substantial issue meriting this Court's attention.

### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
*Solicitor General.*

BENEDICT P. COTTONE,
*General Counsel,*
*Federal Communications Commission.*

MAY 1949

# APPENDIX

The Communications Act of 1934 (48 Stat. 1064, 47 U. S. C. 151 *et seq.*) provides in pertinent part:

ALLOCATION OF FACILITIES; TERM OF LICENSES

SEC. 307. [47 U. S. C. 307] (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

* * * * *

HEARINGS ON APPLICATIONS FOR LICENSES; FORM OF LICENSES; CONDITIONS ATTACHED TO LICENSES

SEC. 309. [47 U. S. C. 309] (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

* * * *



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# Supreme Court of the United States

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No. 689

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CHARLES C. CARLSON, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*
LOUISE C. CARLSON, *Intervenor*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF FOR INTERVENOR IN OPPOSITION

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### OPINIONS BELOW

The findings of fact, conclusions of law, and order of the Federal Communications Commission (J. A. 204) are not yet reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (J. A. 276) is not yet reported.

## JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit on February 14, 1949, affirmed the decision of the Federal Communications Commission. The petition for a writ of certiorari was filed on April 1, 1949. Petitioner invokes the jurisdiction of this Court under the provisions of 62 STAT. ....., 28 U. S. C. A. §1254(1)(1948).

## QUESTION PRESENTED

Whether the Federal Communications Commission properly denied petitioner's application for renewal of his station license on the basis of findings of fact and conclusions made on the hearing record that petitioner had demonstrated his lack of qualifications to continue as a radio broadcasting station licensee because of continued and persistent violations of the Commission's Rules and Regulations and Standards of Good Engineering Practice over a period of years.

## STATUTE AND RULES AND REGULATIONS INVOLVED

The statute and rules and regulations involved are the Communications Act of 1934, as amended, 48 STAT. 1064 (1934), 47 U. S. C. §151 (1946), and the Rules and Regulations of the Federal Communications Commission. The pertinent sections of the Communications Act and of the Commission's Rules and Regulations are set forth in the appendix to the petition.

## STATEMENT

The intervenor adopts the Statement contained in the brief in opposition of the respondent.

## ARGUMENT

1. The first question presented to this Court is whether petitioner was denied a full and fair hearing because the Commission refused his request for a continuance of the oral argument. It is important to note in this connection that there is no dispute among the parties as to the proper rule of law applicable to the instant issue. Petitioner only cites authority for general legal principles that are obviously applicable to every case involving a hearing. He cites no authority to dispute the fact that the applicable rule of law, as established by this Court and by the United States Court of Appeals for the District of Columbia Circuit, is that a continuance is a matter within the discretion of the trial court or the administrative agency and a ruling on a request for such will not be reversed upon appeal unless there is a clear showing that this discretion has been abused. *Avery* v. *Alabama,* 308 U. S. 444, 446 (1940); *California Oregon Power Co.* v. *Federal Power Commission,* 150 F. (2d) 25, 28 (C. C. A. 9th, 1945), *cert. denied,* 326 U. S. 781 (1946); *Neufield* v. *United States,* 73 App. D. C. 174, 179, 118 F. (2d) 375, 380 (1941), *cert. denied,* 315 U. S. 798 (1942).

This question, therefore, involves, in reality, only an issue of fact. An administrative agency and an appellate court have already decided that the facts alleged by petitioner neither entitled him to a continuance nor justified a reversal of the agency's denial of such. There is nothing of legal importance involved in this question — in fact, a decision on this issue would be of no value as a precedent since the individual facts are peculiar to this case.

One other aspect of the question should be called to the Court's attention. Intervenor, in her opposition to the telegraphic request for a continuance filed by Mr. Maurice B. Gatlin, petitioner's New Orleans counsel, definitely put in issue the good faith of said counsel in making the re-

quest. (J. A. 179). It is submitted that, once such an issue is raised, the administrative agency is clearly justified in denying a request for a continuance. *See Harrah* v. *Morgenthau*, 67 App. D. C. 119, 120, 89 F. (2d) 863, 864 (1937).

Since this question then involves only a pure issue of fact, the following additional information, omitted by petitioner, should be supplied for the Court's consideration: (1) Petitioner's requests for a continuance of the oral argument can hardly be considered to have been reasonable. The petition to reopen the record and continue the oral argument filed on February 10, 1948, in effect requested an indefinite continuance (J. A. 171), and the telegraphic request filed by Mr. Gatlin on February 12, 1948 asked for a month's continuance (J. A. 175). (2) Petitioner alleges that he was deprived of the right to be represented by counsel of his own choice since Mr. Gatlin was not present at the oral argument and his request for a continuance was denied. At the second hearing, held on November 4, 5, and 6, 1946, petitioner was represented by the Washington law firm of Fisher, Wayland, Duvall and Southmayd, and this firm *alone* entered an appearance for petitioner (T. 604). The entire hearing was conducted on behalf of petitioner by Mr. Fisher (J. A. 103 *et seq.*), and Mr. Gatlin appeared only as a witness (J. A. 140). At the time of the telegraphic request for a continuance, petitioner was still represented by his Washington attorneys (J. A. 184). (3) Petitioner never requested the Federal Communications Commission to continue the oral argument on the ground of inadequate notice of the date scheduled therefor.

It is submitted, therefore, that petitioner's first question not only does not present an issue of legal importance but, furthermore, the facts developed in the petition for a writ of certiorari and the oppositions thereto clearly show that the denials of the requested continuances were fully justified.

2. The second question presented for consideration is whether the Commission erred in granting intervenor a comparative hearing with petitioner. The mutually exclusive application of intervenor was filed with the Commission on September 20, 1946, and was accompanied by a petition requesting a consolidated hearing on her application and petitioner's application for renewal of license (J. A. 97). Petitioner did not oppose this petition, and the applications were consolidated for hearing on September 25, 1946. (J. A. 101). Petitioner not only did not oppose the grant of the petition but, in fact, used it as the basis for a petition requesting a continuance of the hearing, which was, as a consequence, postponed from October 10, 1946, to November 4, 1946 (T. 605).

The Commission's Rules in existence at the time of the consolidation provided that the Commission, in the exercise of its discretion, could designate a mutually exclusive application for hearing in a comparative proceeding with an application already designated for hearing even though the former wasn't filed until after the designation of the latter (Pet. App. 24-25). The present rule covering this point and providing that such a mutually exclusive application may only be designated for hearing in the same proceeding if it is filed more than twenty days before the commencement of the hearing did not become effective until December 2, 1946, after the hearing in the instant case was completed. Therefore, petitioner is urging that this Court attach considerable legal importance to an issue involving a rule that no longer is effective and consequently is asking this Court to render a decision that would be of no value as a legal precedent. It is submitted that when petitioner's brief (1) shows that an appellate court has already found a contention to be without merit and (2) fails to even allege that the issue is of any present legal importance, then this question is not a matter which should receive the consideration of this Court.

3. Petitioner's third question raises the issue of whether the Commission was arbitrary in refusing to consider his application for a construction permit to change transmitter location and install new equipment together with the record of the consolidated hearing. The application for a construction permit was not filed until May 28, 1947, more than six months after the hearing record had been closed. It was not until September 24, 1947, more than ten months after the record was closed, that petitioner requested joint consideration of his application for a construction permit and his application for renewal of license (J. A. 167). Irrespective of how such a consolidation would have violated the procedural rights of intervenor, it is clear that the petition for consolidation was addressed solely to the discretion of the Commission. Petitioner cites neither statute, regulation, nor case authority to show that he was entitled to such a comparative consideration as a matter of right. Therefore, petitioner is again asking this Court to grant certiorari to review the Commission's exercise of its discretion, without questioning the validity of the applicable rule of law.

4. The fourth question raised by petitioner is based on the Commission's denial on April 22, 1948, of his second petition to reopen the record, filed on March 18, 1948 (J. A. 189). Petitioner contended that intervenor had attempted to seize control of Station WJBW in contravention of Section 310(b) of the Communications Act of 1934 and that the Commission should have reopened the record in this proceeding to receive evidence on this point since it was related to the qualifications of intervenor to be a licensee.

Appellant's brief in the appellate court raised, for the first time, the argument that had the Commission considered the evidence concerning the alleged violation by intervenor of Section 310(b) ". . . it might well have reached a different conclusion than it did in denying appellant's ap-

plication . . ." The second petition to reopen the record did not, in any way, allege that this evidence was relevant or material to appellant's case but concerned itself solely with the Commission's duty to take action against intervenor for her alleged violation of the Communications Act of 1934. Nor was this contention raised in the application for rehearing filed by appellant on May 14, 1948 (J. A. 248). The accepted rule of law is that an appellate court will not consider or review contentions not presented before the lower court. *Adams* v. *Mills*, 286 U. S. 397, 416-417 (1932); *United Rys. & Electric Co. of Baltimore* v. *West*, 280 U. S. 234, 248 (1930). It is submitted, therefore, that petitioner may not now contend in this Court that the admission of this evidence would have affected the decision in his case and, therefore, its exclusion by the Commission was erroneous.

In addition, it is submitted that petitioner had no appealable interest based on the Commission's refusal to receive this evidence, and the question presented to this Court is therefore moot. Both the Commission's proposed and final decisions denied petitioner's application for renewal of license solely on the ground that the record conclusively demonstrated his unfitness to be a licensee of a radio station. The granting of a construction permit to intervenor was not made on the basis of any comparative qualifications. Petitioner would have been deprived of his license whether intervenor had applied for his facilities or not, and, therefore, the grant to intervenor was in no way prejudicial to him. After the decision, intervenor's status as the permittee of a radio station was separate and distinct from petitioner's. When petitioner complained that intervenor was not qualified to be a licensee, he was in the same status as any other citizen making a complaint, and he had no right to insist that the Commission take any action on that complaint. Therefore, he was not injured by the Commission's refusal to reopen the record to receive this evidence, and he cannot now urge this con-

tention before this Court since he is not aggrieved or adversely affected by the Commission's action in this respect.

Petitioner contends in his argument that the Court of Appeals' decision in the instant case appears to be in conflict with its decision in *WJR, The Goodwill Station, Inc.* v. *Federal Communications Commission,* No. 9464, decided on October 7, 1948. It is submitted that the decision in that case does not conflict with the Court of Appeals' decision in the instant proceeding because of a completely different factual situation. In the *WJR* case, appellant was an existing licensee protesting the Commission's grant, without hearing, of a construction permit for a station to operate on the same frequency as was assigned to it. Section 312(b) of the Communications Act of 1934 provides that an existing station's license may be modified only after a hearing. Appellant filed a timely petition for reconsideration of the Commission's action, as provided by Section 405 of the Communications Act of 1934, setting forth therein facts which it alleged showed that it was entitled to a hearing. This petition was denied by the Commission without granting appellant an opportunity for oral argument thereon. The appellate court held that appellant could not be deprived of its statutory right to a hearing, and, since it had proceeded in conformance with the statutory remedy provided in Section 405, it was entitled to an oral argument on the petition for reconsideration. The significant factor in that case was that appellant possessed a statutory right to a hearing, and, unless a hearing were afforded at the time it was requested, appellant would be forever deprived of this right.

In the instant case, however, petitioner had no statutory right to an oral argument on his petition to reopen the record. Moreover, petitioner did not even proceed in accordance with the statutory remedy provided in Section 405. Therefore, his petition was directed to the general power of the Commission to grant or deny oral argument

as a matter of discretion. Unlike the WJR case, therefore, since no statutory right of petitioner is invoked, it follows that no hearing is required by due process. This Court has clearly held that no such right accrues to a party filing a petition for rehearing:

> "One of the grounds of resistance to administrative orders throughout federal experience with the administrative process has been the claims of private litigants to be entitled to rehearings to bring the record up to date and meanwhile to stall the enforcement of the adminstrative order. Adminstrative consideration of evidence — particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it — always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening. It has been almost a rule of necessity that rehearings were not matters of right but were pleas to discretion. And likewise it has been considered that the discretion to be invoked was that of the body making the order, and not that of a reviewing body." *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 514-515 (1944).

Petitioner had a statutory right to a hearing before his application for renewal of license could be denied. The material fact in the instant case which distinguishes it from the *WJR* case is that petitioner received the hearing required by statute. The case, therefore, is completely opposite. In the instant case, petitioner, after his statutory right to a hearing had been fully complied with, asked for an additional hearing on a matter addressed solely to

the discretion of the Commission. Whether or not a party has been deprived of a fair hearing in any particular case is to be determined by looking at the proceedings as a whole. Due process does not require that any particular procedure be followed, and it is essential only that a party receive a full and fair hearing at some stage of the proceedings before the decision becomes final:

> "We think no substantial question of due process is presented. The requirements imposed by that guaranty are not technical, nor is any particular form of procedure necessary. Morgan v. United States, 298 U. S. 468, 481, 56 S. Ct. 906, 912, 80 L. Ed. 1288. 'The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective.'" *Inland Empire District Council, Lumber and Sawmill Workers Union* v. *Millis*, 325 U. S. 697, 710 (1945), *rehearing denied*, 326 U. S. 803 (1945).

It is submitted, therefore, that petitioner's allegation that the instant case is in conflict with the lower court's previous decision in the *WJR* case is without merit. In addition, it is clear that the facts of this case do not raise a question of legal importance as to "the area in which the Commission is required to 'hear' petitions of interested parties presenting questions of law or fact and the area in which petitions may be denied without a hearing," as is suggested in the instant petition. As heretofore shown, the "area" involved in the instant case is one in which a complete hearing has been afforded and the record closed. Since this Court has already clearly held that a petition in this "area" is addressed solely to the discretion of the administrative agency, and thus no hearing is required, it is submitted that this question has been specifically answered, with the decision in the instant case being in complete harmony therewith.

5. Petitioner's final question raises the point that the Commission erred in failing to consider all of the evidence and in failing to find that petitioner was qualified to receive a renewal of his license. Again petitioner is not raising a question of general legal importance but only the issue as to whether there was substantial evidence in the record to support the findings of the Commission. The appellate court found that there was ample evidence, and petitioner, by conceding in his petition that most of the alleged violations took place, stipulates himself out of court.

In the opening paragraph of his argument, petitioner contends that it would be appropriate for the Court to grant certiorari in this case "in order to lay down well-defined principles for the guidance of the Commission in future cases" involving applications for renewal of license. It is clear, however, that there is only one principle involved that is peculiar to these cases, i.e., that repeated and willful violations of the Commission's Rules and Regulations fully justify a denial of an application for renewal of license. Without such a power to protect its Rules and Regulations, the Commission would be rendered helpless as an administrative agency. The United States Court of Appeals for the District of Columbia Circuit has specifically upheld the Commission's authority in this regard. *Greater Kampeska Radio Corporation* v. *Federal Communications Commission*, 71 App. D. C. 117, 108 F. (2d) 5 (1939). Therefore, a review of the instant case would not result in any definition of law in connection with applications for renewal of license that is not already well established.

It is submitted, therefore, that a review of this case would not establish any principles of legal importance or guidance in future cases since petitioner has in effect only alleged that, while the appplicable law is clear, the facts of his case require a different decision. Such an allegation can be made by every litigant in every case. Intervenor has

charged that petitioner was not proceeding in good faith (J. A. 179), and the United States Court of Appeals for the District of Columbia Circuit, by hearing the case on Friday, February 11, 1949, issuing a *per curiam* decision on Monday, February 14, 1949, and awarding costs to intervenor, in effect, has held that the appeal was frivolous (J. A. 277). Such a decision creates a *prima facie* case that petitioner's appeal does not raise any question of legal importance, and it is submitted that the petition for a writ of certiorari completely fails to rebut that presumption.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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April 1949